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Supreme Court, U.S.
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No. 03-1500

In The

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 351 F.3d 173 (5th Cir. 2003). A copy of this opinion is included as Appendix A. The United States Court of Appeals for the Fifth Circuit denied *en banc* review on January 5, 2004. A copy of this order is included as Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for redress of grievances." U.S. Const., amend. I.

STATEMENT OF THE CASE

On the grounds of the Texas State Capitol there is a large granite monument in which the Ten Commandments are etched. The monument is approximately six feet high and three and a half feet wide and is located on a line drawn between the Supreme Court and the Capitol Rotunda, approximately 75 feet from the Capitol building

and 123 feet from the Supreme Court building. Anyone walking from the Capitol to the Supreme Court would see this prominently displayed monument. The monument contains the Ten Commandments written in very large letters. Above the text, there are two small tablets with ancient script. The monument also includes two small Stars of David; two Greek letters, Chi and Rho, superimposed over each other to represent Christ; an American eagle grasping the American flag; and an eye inside a pyramid, which is similar to the symbol on the one-dollar bill. These other symbols are much smaller than the text of the Ten Commandments, which occupies most of the space on the monument. Under the Ten Commandments are the words, "Presented to the people and youth of Texas by the Fraternal Order of Eagles of Texas, 1961." A picture of the monument is included as Appendix C.

There are several other monuments on the grounds of the Texas State Capitol, but the Ten Commandments monument is the only one with religious content. In the area between the Capitol and the Supreme Court building there is a monument paying tribute to children in Texas; a statue of a pioneer woman holding a child; a replica of the Statute of Liberty; and a tribute to Texans who died at Pearl Harbor. 351 F.3d at 176.

The Ten Commandments monument, like the others, is maintained by the State Preservation Board. The monument was a gift of the Fraternal Order of Eagles and was accepted by a joint resolution of the House and the Senate in early 1961. *Tex. S. Con. Res. 16,* 57th Leg. R.S., 1961 Tex. Gen. Laws 1195-1196. The resolution also authorized the placement of the monument on the Capitol grounds.

The parties to this litigation stipulated that the State selected the site for the monument based on the recommendation of the Building Engineering and Management Division of the State Board of Control. The expenses of its construction were borne by the Eagles.

There is very little legislative history concerning the Texas legislature's approval of the Ten Commandment monument. The parties stipulated that the legislative history "contain[s] no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of House and Senate journal entries." The parties also stipulated that the dedication of the monument was presided over by Senator Bruce Reagan and Representative Will Smith.

The State Preservation Board, an agency of the State of Texas, was created by the Legislature in 1983. *V.T.C.A. Government Code,* §443.001. Ownership of the Capitol Building, including the Ten Commandments monument, was soon transferred to the Board. The Board is vested with and exercises broad authority over the Capitol Building and grounds, including maintaining the Ten Commandments monument. *V.T.C.A. Government Code,* §443.001.

In 1990, at the direction of the Board, the Ten Commandments monument was removed and placed in storage for construction of the Capitol extension. In 1993, although other monuments were not replaced after being taken down, the State Preservation Board decided to retain the Ten Commandments monument, keep it in its current location, but turn it to face in a different direction. 351 F.3d at 181.

The plaintiff, Thomas Van Orden, is a resident of Austin, Texas and brought this action to have the Ten Commandments monument removed from the grounds of the State Capitol. The District Court entered judgment for the defendants and the United States Court of Appeals for the Fifth Circuit affirmed. Van Orden's motion for rehearing and suggestion for rehearing *en banc* was denied.

REASON FOR GRANTING THE WRIT

THE SUPREME COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO DECIDE A QUESTION OF NATIONAL IMPORTANCE AS TO WHETHER A TEN COMMANDMENTS MONUMENT ON GOVERNMENT PROPERTY IS AN IMPERMISSIBLE ESTABLISHMENT OF RELIGION IN VIOLATION OF THE FIRST AMENDMENT

A. The Circuits Are Split Over The Issue Of Whether Ten Commandments Monuments On Government Property Violate The Establishment Clause

Seven Circuits now have ruled on the question of whether Ten Commandments displays on government property violate the Establishment Clause. Three Circuits, including the Fifth Circuit in this case, have rejected the constitutional challenges and allowed the monuments to remain. *See also Freethought Society of Greater Pa. v. Chester County,* 334 F.3d 247 (3d Cir. 2003); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973). Four Circuits, though, have come to an opposite conclusion and have found Ten Commandments monuments unconstitutional. *See ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004); *ACLU of Kentucky v. McCreary County,* 354 F.3d 438 (6th Cir. 2003); *Glassroth v. Moore,* 335 F.3d 1282 (11th Cir. 2003); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Books v. City of Elkhart, Indiana*, 235 F.2d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001).

Almost all of these decisions, like this case, involved Ten Commandments monuments on government property placed there by the Fraternal Order of Eagles. All involved monuments that had been on government property for some time, often decades, before the constitutional challenge. Most of the cases are very recent, reflecting a national trend to challenges of the sort brought in this case.

Indeed, shortly after the Fifth Circuit decided this case and found no violation of the Establishment Clause, the United States Court of Appeals for the Eighth Circuit came to an opposite conclusion in a case with virtually identical facts. *ACLU Nebraska Foundation v. City of Plattsmouth* involved a five foot tall granite monument containing the Ten Commandments placed in a park in the City of Plattsmouth. 358 F.3d at 1025. As in this case, the monument was a gift from the Fraternal Order of Eagles. The Plattsmouth monument has the identical content to the one found on the grounds of the Texas State Capitol: an inscription of the Ten Commandments in large letters, an eye within a triangle, two Stars of David, and the intertwined symbols for "chi" and "rho." The monument also had a statement that it was donated by the Fraternal Order of Eagles. *Id.*

As in this case, there is virtually no legislative history of the government's purpose in placing the monument on government property in Plattsmouth. But unlike this case, the United States Court of Appeals for the Eighth Circuit concluded that the Ten Commandments are inherently religious and thus have the purpose and effect of impermissibly advancing religion under the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Eighth Circuit explained that "the monument's religious purpose stands naked in the middle of the park with no evident purpose but to endorse and advance its religious message." 358 F.3d at 1037.

The conflict between the Fifth Circuit, in this case, and the Eighth Circuit, in *ACLU Nebraska Foundation v. City of Plattsmouth*, is indicative of the split which exists among Circuits throughout the country. For example, the Tenth Circuit, in *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973), found that the Establishment Clause was not violated by the presence on courthouse grounds of a granite monument, measuring three feet by five feet, with the same content as the monument in this case. As in this case, the monument was donated by the Fraternal Order of Eagles. In contrast, the Seventh Circuit found that an identical monument on the grounds of a county courthouse violated the Establishment Clause. *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001).

The Circuits are also split as to when the Establishment Clause is violated by Ten Commandments displays on government property that are depicted in forms other than monuments. For example, the United States Court of Appeals for the Third Circuit found that the presence on the wall of a county courthouse of a plaque containing the

Ten Commandments did not violate the Establishment Clause. *Freethought Society of Greater Pa. v. Chester County,* 334 F.3d 247 (3d Cir. 2003). But the United States Court of Appeals for the Sixth Circuit found that the posting of framed copies of the Ten Commandments in county courthouses and schools violated the Establishment Clause. *ACLU of Kentucky v. McCreary County,* 354 F.3d 438 (6th Cir. 2003).

There is no way to reconcile these cases. The Circuits are split as to whether and when displays presenting the Ten Commandments are allowed on government property. As the Eighth Circuit recently noted: "Even considering the different factual contexts of these monuments, it would appear that the decisions of the Fifth and Tenth Circuits and the Colorado Supreme Court are in conflict with those of the Seventh and Sixth Circuits." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1035.

This Court should grant certiorari to resolve this conflict among the Circuits that will continue to generate a large number of lawsuits all over the country. The Fraternal Order of Eagles gave "scores of other monuments . . . to towns and cities in the 1950s and 1960s." *Id.* at 1025; *see also Books v. City of Elkhart,* 235 F.3d at 306 (describing the Fraternal Order of Eagles national campaign in the 1950s and 1960s to donate Ten Commandments monuments throughout the country). Each of these is the basis for a likely First Amendment challenge and courts are divided over when and whether such displays are allowed.

B. This Court Should Grant Review To Clarify The Law Of The Establishment Clause Concerning When Religious Symbols On Government Property Violate The Establishment Clause

The six-foot by three-and-a-half-foot granite–monument, located between the Texas State Capitol and the Texas Supreme Court, contains the following words in large letters:

> the Ten Commandments
> I AM the LORD thy God.
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the Name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.
> Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbor.
> Thou shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife nor his manservant nor his maidservant, nor his cattle nor anything that is his neighbor's.

See Appendix C (photograph of the monument).

The constitutionality of this large monument prominently displayed on government property raises important issues concerning the meaning of the Establishment Clause: How is it determined if a monument is a religious symbol? How is it determined whether the purpose of a symbol is to advance religion? How is it determined

whether a symbol has the effect of impermissibly advancing religion? As to these specific questions, as well as the general issue of the constitutionality of Ten Commandments displays on government property, the Circuits are split.

1. Is the Ten Commandments monument religious?

There is no doubt that the Ten Commandments are religious, both in their origin and in their content. As this Court expressed in *Stone v. Graham*, 449 U.S. 39, 41 (1980): "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." As Justice Stevens explained: "[The phrase] 'I AM the LORD thy GOD' . . . is rather hard to square with the proposition that the monument expresses no particular religious preference – particularly when considered in conjunction with . . . [the fact] that the monument also depicts two Stars of David and symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ." *Elkhart v. Books,* 532 U.S. 1058 (2001) (Stevens, J., opinion respecting denial of certiorari).

Yet, the Circuits are divided over how to characterize monuments containing the Ten Commandments. The Fifth Circuit, in this case, described the monument as displaying "a nonsectarian version of the text of the Commandments." *Van Order v. Perry*, 351 F.3d at 176. But the Eighth Circuit, for example, regards the Ten Commandments as inherently sectarian, expressing the views of particular religions. The Eighth Circuit explained that "[t]he reasonable viewer would perceive this monument as

an attempt by Plattsmouth to steer its citizens in the direction of mainstream Judeo-Christian religion." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1042. The court concluded: "The monument's endorsement of multiple Judeo-Christian faiths, instead of one particular sect, is no less of an establishment than endorsement of one alone." *Id.* Indeed, the Fifth Circuit's characterization of the Ten Commandments display as "nonsectarian" is inconsistent with this Court's declaration that "[t]he simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." *County of Allgeheny v. American Civil Liberties Union*, 492 U.S. 573, 615 (1989).

Moreover, there is disagreement among the Circuits as to whether a Ten Commandments display can be understood as a historical, rather than a religious symbol. The Fifth Circuit in this case emphasized the historical importance of the Ten Commandments and stated: "Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. The extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars." *Van Orden v. Perry*, 351 F.3d at 181.

This is inconsistent with this Court's decision in *Stone v. Graham*, which rejected the argument that a display of the Ten Commandments was permissible as a recognition of the historical basis for our laws. As the Eighth Circuit recently declared in rejecting the view that a display of the Ten Commandments on government property is just historical acknowledgment of God: "The monument does much more than acknowledge God; it is an instruction

from the Judeo-Christian God on how He requires His followers to live. To say a monument inscribed with the Ten Commandments and various religious and patriotic symbols is nothing more than an acknowledgment of God diminishes the sanctity to believers and belies the words themselves." 358 F.3d at 1042.

The underlying issue of how to determine whether a symbol is religious transcends this case and is important in a large number of disputes under the First Amendment. This Court should grant certiorari to resolve the conflicts between the Circuits over whether the Ten Commandments is a religious symbol and to clarify this important legal question.

2. Does the Ten Commandments monument have a secular purpose?

This Court has been clear that a government action violates the Establishment Clause unless there is a valid secular purpose. *Lemon v. Kurtzman,* 403 U.S. at 612-13. Moreover, this Court has explained that "[w]hile the Court is normally deferential to a State's articulation of a purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).

In this case, there is no legislative history concerning why the Texas legislature accepted the Ten Commandments monument and placed it in a prominent position on the grounds of the Texas Capitol. Nonetheless, the Court of Appeals uncritically accepted that "the purpose of the legislature was 'to recognize and commend a private organization for its efforts to reduce juvenile delinquency.'" 351 F.3d at 173. This was based entirely on the

Resolution granting the Eagles permission to erect the monument. *Id.*

But by accepting this explanation without further support, and by ignoring the State Preservation Board's independent decision to reinstall the monument on Capitol grounds in 1993, the Court of Appeals violated this Court's command that courts "distinguish a sham secular purpose from a sincere one." *Santa Fe Indep. School Dist. v. Doe,* 530 U.S. 290, 308 (2000). The Court of Appeals came to its conclusion by concluding that the "Commandments have a secular dimension as well as a religious meaning." 351 F.3d at 173. However, as this Court recognized in *Stone v. Graham*, the Ten Commandments are inherently religious. There is no secular purpose in placing on government property a monument declaring: "I AM the LORD thy God. Thou shalt have no other gods before me. Thou shalt not make thyself any graven image. Thou shalt not take the Name of the Lord thy God in vain."

Indeed, the Sixth, Seventh and Eighth Circuits rejected exactly the argument accepted by the Fifth Circuit in this case: that the government had a valid secular purpose in accepting a monument from the Fraternity of Eagles because of that organization's commitment to combating juvenile delinquency. The Sixth Circuit, in an approach at odds with that taken by the Fifth Circuit in this case, stated: "A finding of religious purpose is militated by the blatantly religious content of the displays. . . . [T]he Ten Commandments are an active symbol of religion because they 'concern the religious duties of believers.'" *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky,* 354 F.3d at 455, quoting, *Stone v. Graham,* 449 U.S. at 42. Similarly, the Seventh Circuit declared: "The Ten Commandments is still

an inherently religious text, and we conclude that the State has not articulated a valid secular justification for planning to erect the monument. . . . The Commandments are historical, secular 'core values' only to those who adhere to them." *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d at 771. Likewise, the Eighth Circuit concluded that the government's purpose in "accepting, erecting and maintaining the monument is to be found in the content and context of the monument itself. . . . The monument's message is undeniably religious. . . . The monument declares the existence and supremacy of God. Some of the rules of behavior are exclusively religious." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1036. The Fifth Circuit's acceptance of a secular, historical purpose for a Ten Commandments monument cannot be reconciled with the Eighth Circuit's statement that such a display "is the paradigmatic violation of the Establishment Clause: government speech declaring religious truth." *Id.* at *13.

Moreover, the Circuits are split as to whether the presence of a Ten Commandments monument for a long period of time affects the analysis of whether there is an impermissible purpose of advancing religion. The Fifth Circuit, in this case, gave great weight to the fact that the display had been on the State Capitol ground for 42 years before a constitutional challenge was brought: "Had this monument been recently installed, the inference of religious purpose would have been stronger. That it has been in place for so long adds force to the contention that the legislature had a secular purpose." *ACLU Nebraska Foundation v. City of Plattsmouth*, 351 F.3d at 181-82. But, in contrast, the Eighth Circuit found the fact that a Ten Commandments monument was on government

property for 35 years before a constitutional challenge did not refute that its purpose was to advance religion. *Id.* at 1038.

Thus, this Court should grant review to resolve a split among the Circuits as to whether a Ten Commandments monument on government property serves a valid secular purpose and, more generally, how the government's purpose is to be determined when an unquestionably religious symbol is erected on government property.

3. Does the Ten Commandments monument have the effect of advancing and endorsing religion?

This Court also has been clear that a government action violates the Establishment Clause if its principal or primary effect is one that advances religion. *Lemon v. Kurtzman*, 403 U.S. at 612. Under this test, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly,* 465 U.S. 668, 694 (1984).

The Fifth Circuit found that the presence of the Ten Commandments monument on the State Capitol grounds did not impermissibly endorse religion. The Court explained: "The Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court building and the Capitol Building housing the legislative and executive branches of government. We are not persuaded that a reasonable viewer touring the Capitol and its grounds, informed of its history and its placement, would conclude

that the State is endorsing the religious rather than the secular message of the decalogue." 351 F.3d at 182.

There are several problems with the Fifth Circuit's analysis which warrant this Court granting certiorari to clarify how it is to be determined whether a religious symbol on government property is an impermissible symbolic endorsement of religion. First, the Fifth Circuit's reference to 17 monuments in the general area is misleading because, as the Fifth Circuit explained in its statement of the facts of this case, there are only three other monuments in the area where the Ten Commandments are located, between the Capitol and the Supreme Court building. 351 F.3d at 176.* None of the others has any religious content. *Id.* As the Eighth Circuit noted in declaring a similar Ten Commandments monument unconstitutional, "The monument's religiosity stands in sharp contrast to, and therefore is amplified by, the recreational uses of the space. Nothing about the park secularizes the pronounced religiosity of the monument." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1041.

Second, the Fifth Circuit concluded that the presence of the Ten Commandments near the State Capitol and State Supreme Court building conveyed a secular

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* Many of the other symbols referred to by the Fifth Circuit are plaques and memorabilia inside the buildings, including "a Six Flags Over Texas display on the floor of the Capitol Rotunda" and a phrase, in Latin, above the bench of the Texas Supreme Court. 351 F.3d at 176. These symbols are likely irrelevant to how the reasonable observer would perceive an overtly religious monument on the grounds between the Capitol and Supreme Court building.

message. But as other Circuits have concluded, a monument proclaiming the existence of God and God's rules for behavior inherently has the effect of endorsing for religion. For example, Eleventh Circuit came to the opposite conclusion to the Fifth Circuit in finding that a large Ten Commandments monument in the Alabama State Judicial Building clearly had the effect of endorsing religion. *Glassroth v. Moore,* 335 F.3d at 1296-97. Similarly, the Sixth Circuit found that posting framed copies of the Ten Commandments in courthouses and schools was inherently government endorsement of religion. *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 354 F.3d at 469.

Moreover, the Eighth Circuit found that the other symbols on the monument – present on the monument in both that case and in this one – created an impermissible effect of endorsing religion. The Court explained: "The monument's inscription links government to its religious message to a degree its location may not. Specifically, the inclusion of the patriotic symbol of an eagle gripping a flag on the monument impermissibly links patriotism and the government to the religious teaching on the monument." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1041. The Fifth Circuit ignored this aspect of the monument and its endorsement for religion.

Here, too, there is a need for this Court to grant review to resolve a conflict among the Circuits as to when a Ten Commandments monument impermissibly endorses religion and, more generally, how courts are to determine whether the reasonable observer would find a symbolic

endorsement which violates the Establishment Clause of the First Amendment.

CONCLUSION

Thomas Van Orden respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

351 F.3d 173

United States Court of Appeals,
Fifth Circuit

Thomas **VAN ORDEN**, Plaintiff-Appellant,
v.
Rick **PERRY**, in his official capacity as Governor of Texas and Chairman, State Preservation Board; David Dewhurst, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas; Tom Craddick, in his official capacity as Co-Vice Chairman, State Preservation Board and Speaker of the House of Representatives of Texas; Chris Harris, in his official capacity as Member of the State Preservation Board; Peggy Hamrick, in her official capacity as Member of the State Preservation Board; Jocelyn Levi Straus, in her official capacity as Member of the Texas Preservation Board; Charlynn Doering, in her official capacity as Interim Executvie Director, State Preservatoin Board, Defendants-Appellees.

No. 02-51184.

Nov. 12, 2003.

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Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, STEWART and PRADO, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The plaintiff, Thomas Van Orden, asks the federal courts to order the State of Texas to remove from the grounds of the State Capitol a granite monument in which the Ten Commandments are etched. In a bench trial, the district court considered documents, testimony, and an extensive stipulation of facts filed by the parties. In a careful opinion, the court rejected the claim of First Amendment violations and entered judgment for the State. The plaintiff appeals. We affirm.

I

The Capitol, with its surrounding twenty-two acres, was dedicated on May 16, 1888. The first monument was erected on these grounds three years later. It was "a bronze statue of a Texan holding a muzzle-loading rifle atop a Texas Sunset Red granite base." Names of the Texans who died in the battle of the Alamo are inscribed on its four granite supports. Sixteen additional monuments have since been erected on the capitol grounds, a

protected National Historic Landmark maintained by the State Preservation Board.[1]

The Visitor Services of the State provides tours of the Capitol Building with its historic statuary, portraits, and memorabilia, and it publishes a written guide for walking tours of the grounds for visitors who wish to continue with the outdoor displays. The guided tour of the Capitol Building offers a wide array of monuments, plaques, and seals depicting both the secular and religious history of Texas. They include a tribute to African American legislators, a Confederate plaque, a plaque commemorating the donors of the granite for the building, and a plaque commemorating the war with Mexico. There is a Six Flags Over Texas display on the floor of the Capitol Rotunda featuring the Mexican Eagle and serpent – which as visitors will learn, is a symbol of Aztec prophecy – together with the Confederate Seal containing the inscription "Deo Vindice" (God will judge). Should the tour continue to the Supreme Court Building, visitors will find inscribed above the bench the phrase "Sicut Patribus, Sit Deus Nobis" (As God was to our fathers, may He also be to us). Before reaching the Supreme Court building from the Capitol, visitors will encounter four other monuments in the immediate vicinity: a tribute to Texas children; a statue of a pioneer woman holding a child in tribute to the role of

[1] The parties stipulated that "the Capitol, together with its grounds and the monuments erected and maintained there, constitute a National Historic Landmark." They also stipulated that "the Ten Commandments monument is an element of a legally-protected National Historic Landmark."

women in Texas history; a replica of the Statue of Liberty; and a tribute to the Texans lost at Pearl Harbor.

The Ten Commandments monument was a gift of the Fraternal Order of Eagles, accepted by a joint resolution of the House and Senate in early 1961. It is a granite monument approximately six feet high and three and a half feet wide. In the center of the monument, a large panel displays a nonsectarian version of the text of the Commandments. Above this text, the monument contains depictions of two small tablets with ancient Hebrew script. There are also several symbols etched into the monument: just above the text, there is an American eagle grasping the American flag; higher still, there is an eye inside a pyramid closely resembling the symbol displayed on the one-dollar bill. Just below the text are two small Stars of David, as well as a symbol representing Christ: two Greek letters, Chi and Rho, superimposed on each other. Just below the text of the commandments, offset in a decorative, scroll-shaped box, the monument bears the inscription: "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961."

The parties stipulated that (1) the sparse legislative history "contain[s] no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of House and Senate Journal entries"; (2) the State selected the site on the recommendation of the Building Engineering and Management Division of the State Board of Control; (3) the expenses "were borne exclusively by the Eagles"; (4) the monument requires virtually no maintenance; and (5) the dedication of the monument was presided over by Senator Bruce Reagan

and Representative Will Smith. There is no official record that any other person participated.

The main entry into the Capitol Building is on its south side facing Congress Street. The monument displaying the Ten Commandments is located on the north side of the Capitol Building on a line drawn between the Supreme Court and the Capitol Rotunda, about 75 feet from the Capitol Building, and 123 feet from the Supreme Court Building.

II

The plaintiff argues that Texas "accepted" the monument "for the purpose of promoting the Commandments as a personal code of conduct for youths and [b]ecause the Commandments are a sectarian religious code, their promotion and endorsement by the State as a personal code contravenes the First Amendment." He asserts that the district court's finding that the State had a secular purpose for the display is not supported by the evidence and that a reasonable viewer would perceive the display of the decalogue as a State advancement and endorsement of religion favoring the Jewish and Christian faiths.

The State replies that the display serves a secular purpose as found by the district court and a reasonable observer would not conclude that the State is seeking to advance, endorse, or promote religion by its display. To the contrary, the State observes that the display has been in place without legal attack for over forty-two years and, viewed in context, is part of the state's commemorative display of significant events and strands of Texas history. It argues that a reasonable person touring the Capitol Building and its historical grounds would not see the

display of the decalogue as State endorsement of religion. Rather, with its simple presentation and location between the Capitol Building and the Texas Supreme Court Building, a reasonable viewer would see the monument as a recognition of the large role of the decalogue in the development of Texas law. Equally, with its proximity to the pioneer woman holding a child and to the figures of children at play, it would be seen as a fit location to express appreciation for the work of the Eagles with American youth.

III

Through the Fourteenth Amendment, Texas is controlled by the command of the First Amendment that it "shall make no law respecting an establishment of religion."[2] In its thirty-two year life, *Lemon v. Kurtzman*[3] has been criticized but remains a required starting point in deciding contentions that state displays of symbols and writings with a religious message are contrary to the First Amendment. Its three-part test requires that a court consider (1) whether the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion.[4] A challenged activity must survive each prong to pass constitutional scrutiny. The plaintiff here

[2] U.S. CONST. amend. I, cl. 1.

[3] 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[4] *Edwards v. Aguillard,* 482 U.S. 578, 583, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987).

concedes that excessive entanglement, the third inquiry, is not an issue in this case. We need only consider, then, whether Texas lacked a secular purpose and whether the primary effect of the display is to advance religion.

In refining these two tests, the Supreme Court has interpreted the First Amendment to prohibit government action that has either the purpose or effect of endorsing or disapproving of religion.[5] A display has the purpose of endorsing religion when it "'convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred.'"[6] And to determine whether it has the effect of endorsing religion we ask "what viewers may fairly understand to be the purpose of the display."[7] This is the observation of a reasonable observer, not of the uninformed, the casual passerby, the heckler, or the reaction of a single individual. Rather, the reasonable observer standard attempts to capture the "concern with the political community writ large."[8]

[5] *County of Allegheny v. Am. Civil Liberties Union,* 492 U.S. 573, 600-01, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); *Lynch v. Donnelly,* 465 U.S. 668, 690, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring).

[6] *Allegheny,* 492 U.S. at 593, 109 S.Ct. 3086 (quoting *Wallace v. Jaffree,* 472 U.S. 38, 70, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring)).

[7] *Allegheny,* 492 U.S. at 595, 109 S.Ct. 3086 (quoting *Lynch,* 465 U.S. at 692, 104 S.Ct. 1355 (O'Connor, J., concurring)).

[8] *See Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 779-780, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort. . . . It is for this reason that the

(Continued on following page)

The guiding principle is government neutrality toward religion in the sense that a state cannot favor religion over non-religion or one religion over another. Yet neutrality is not self-defining. It does not demand that the state be blind to the pervasive presence of strongly held views about religion with myriad faiths and doctrines. Nor could it do so. Religion and government cannot be ruthlessly separated without encountering other First Amendment constraints, including its guaranty of the free exercise of religion. Such hostility toward religion is not only not required; it is proscribed.[9] Justice Kennedy's observation in *Allegheny* bears emphasis: it is not the case that the Establishment Clause is so inelastic as to not "permit government some latitude in recognizing and accommodating the central role religion plays in our society."[10] It is equally important to remember Justice Goldberg's famous observation:

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion. . . .[11]

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reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]."); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001).

[9] *See Lynch*, 465 U.S. at 673, 104 S.Ct. 1355.

[10] *Allegheny*, 492 U.S. at 657, 109 S.Ct. 3086 (Kennedy, J., concurring in part and dissenting in part).

[11] *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring).

In sum, we recognize that proper application of First Amendment principles demands a sense of proportion and that our inquiry is fact-sensitive. Ultimately, we have the delicate task of placing this display of the decalogue in its full setting. We turn to that task, asking first if the Texas Legislature had a valid secular purpose for authorizing the installation of the monument. We will then examine whether the activity's primary effect advances or inhibits religion.

IV

A

The district court found that the purpose of the legislature was "to recognize and commend a private organization for its efforts to reduce juvenile delinquency." It gleaned this purpose from the reason stated in the Resolution granting the Eagles permission to erect the monument. The plaintiff concedes that this recited purpose is a valid secular purpose, but contends that it was not the true purpose. Rather, he argues that monuments "are not erected to honor donors and they are not erected to pay tribute [to] their acts of donation. They are erected to pay tribute to and honor the subject or ideal depicted."

The Legislature, of course, cannot dictate the finding of secular purpose by a bland recitation. The finding of the district court here, however, rests on two powerful realities. First, there is nothing in either the legislative record or the events attending the monument's installation to contradict the secular reasons laid out in the legislative

record, brief as it is; there is nothing to suggest that the Legislature did not share the concern about juvenile delinquency.[12] Second, Texas has a record of honoring the contributions of donors and those they represent, contrary to plaintiff's unsupported argument. For example, ten years before its resolution accepting the Ten Commandments monument, the Legislature authorized the Boy Scouts of America to install a replica of the Statue of Liberty. The Legislature stated that it did so "in honor of the Boy Scouts of America." The resolution's preamble explained that "nothing has been done to honor the youth of Texas who are members of the Boy Scouts." Whether or not this legislative history would support a finding that the Legislature acted with only a secular purpose, the record supports the finding of the district court that the Texas Legislature had a valid secular purpose in authorizing the placement of the Ten Commandments monument. There is nothing to suggest that the recited reason was a sham, and the State's treatment of other monuments on the Capitol grounds belies any such suggestion. Without more, then, the recited legislative purpose should be accepted.[13]

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[12] For an example of the decalogue's installation coupled with religious ceremony, *see Books v. City of Elkhart, Indiana,* 235 F.3d 292, 306 (7th Cir.2000), *cert. denied,* 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001).

[13] *Wallace,* 472 U.S. at 74-75, 105 S.Ct. 2479; *see also Mueller v. Allen,* 463 U.S. 388, 394-395, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (expressing "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute.").

The plaintiff here argues that there is more. It can hardly be gainsaid, he contends, that in honoring the work of the Eagles in curbing juvenile misconduct by its resolution, the Texas Legislature endorsed the decalogue as a common code of conduct and implicitly promoted its religious message. This is half right. The plaintiff's contention here forgets that the Commandments have a secular dimension as well as a religious meaning. The plaintiff presumes both that its use by the Eagles was religious and that authorizing the installation of the monument itself endorsed that religious message.

The plaintiff's argument rests heavily upon the decision of the Seventh Circuit in *Books v. City of Elkhart, Indiana.*[14] In *Books,* there was evidence, found significant by the majority of its panel, that the purpose of the City of Elkhart was to promote the decalogue as a religious statement. The court found the City's statement of secular purpose suspect because it was adopted on the eve of litigation in an effort to escape scrutiny under the First Amendment. The Texas Resolution came in 1961 and was supported by statements honoring the efforts of the donor. Unlike *Books,* there was no religious service attending the acceptance of the monument in Texas. The record shows that only two state legislators attended. There is no evidence of any religious invocations or that any minister, rabbi, or priest were even present. Nor is the context in which the Commandments is displayed here similar to the

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[14] 235 F.3d 292, 306 (7th Cir.2000), *cert. denied,* 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001).

display in *Books*.[15] We are not persuaded that the Resolution of the Texas Legislature in 1961 was a sham.

B

Our conclusion that the legislative authorization was supported by a valid secular purpose is reinforced by the related but distinct inquiry whether the primary effect of the display advances or inhibits religion as seen from the eyes of a reasonable observer, informed and aware of his surroundings.

The Ten Commandments have both a religious and secular message. Given this duality, our effects inquiry must focus on the specific facts and context of the display. As Justice Blackmun explained in *Allegheny*:

> [T]he effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." That inquiry, of necessity, turns upon the context in which the contested object appears:
>
> "[A] typical museum setting, though not neutralizing the religious content of a religious

[15] As we discuss in greater detail below, the context in which the Ten Commandments is displayed on the Capitol grounds is different from that at issue in *Books*, and this unique context negates any sense that the state is endorsing or promoting the decalogue's religious, as opposed to its secular, aspects.

> painting, negates any message of endorsement of that content."[16]

Returning to our earlier description of the Capitol, we note first that the grounds are designated as a National Historic Landmark that is dedicated to the display of "statues, memorials, and commemorations of people, ideals and events that compose Texan identity; these displays document the struggles and the successes that Texans have experienced in the past and serve to inspire us as we face the challenges of today."[17] The State points to the replica of the Seal of Mexico displayed on the tour path of the Capitol, reminding that it "acknowledges the mystical traditions of the indigenous people of the Southwest, who were displaced by a religious Catholic regime for some 300 years."

Relatedly, the State suggests that the decalogue in Texas is displayed in a museum setting. The State points out that the Curator of the Capitol is a professional museum curator, with an advanced degree in museum science and the Texas State Preservation Board qualifies as a museum as defined by federal statute.[18] The State Preservation Board, created in 1983, is an agency of the State of Texas and has broad authority over the Capitol

[16] *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086 (citing *Lynch v. Donnelly*, 465 U.S. at 687, 104 S.Ct. 1355 (O'Connor, J., concurring, embracing Justice O'Connor's concurring opinion in *Lynch*)).

[17] *See* H. Con. Res. 38, 77th Leg., R.S. (2001).

[18] "Museum means a public or private nonprofit agency or institution organized on a permanent basis for essentially educational or aesthetic purposes that utilizes a professional staff, owns or utilizes tangible objects, cares for the tangible objects, and exhibits the tangible objects to the public on a regular basis." 20 U.S.C. § 9172 (2003).

Building and grounds.[19] It employs, among others, three professional curators with graduate degrees in history and museum science. They maintain the historic artifacts of the Capitol Collection, including an art collection with an estimated value of twenty to thirty million dollars. This department oversees the monuments and offers educational programs and brochures, including guided tours of the Capitol Building.

We need not accept the State's museum analogy in full measure to acknowledge that, while short of the museum envisioned by Justice O'Connor, a setting which would wholly negate endorsement, the manner in which the seventeen monuments are presented on the grounds portion of the Capitol tour supports the conclusion that a reasonable viewer would not see this display either as a State endorsement of the Commandment's religious message or as excluding those who would not subscribe to its religious statements.[20]

Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon

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[19] Tex. Gov't Code Ann. §§ 443.001-443.028 (Vernon 1998 & Supp.2004).

[20] A visitor to the Capitol would receive a brochure including "A Self-Guided Tour" with a map showing the location of the seventeen monuments. It includes a brief description of each monument, starting with Hood's Texas Brigade, which "was erected in 1910 by surviving comrades and friends." Similar paragraphs follow for each monument. Number 9 reads: "THE TEN COMMANDMENTS – Erected 1961 by the Fraternal Order of Eagles of Texas. Hewn from Texas granite in the traditional shape of the biblical stones and inscribed with the Ten Commandments, the monument was presented to the people and youth of Texas."

the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society. A reasonable viewer must also be aware of the placement of the monument at a point on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building. It is plainly linked with those houses of the law while standing apart and not physically connected to any of them. The decalogue is presented as relevant to these law-giving instruments of State government, but from a distance.

In 1993, the State Preservation Board had to decide where to locate the monument following a Capitol construction project that had required the removal of many monuments. The Board's executive director, in uncontroverted testimony at trial, explained that the decalogue's location was carefully chosen by the Board's professional staff to reflect the role of the Commandments in the making of law. The only change in where the monument had been located since 1961 was to turn it to face a different direction. The professional judgment of these trained museum curators, made ten years before any litigation, is relevant to our question of effect, as well as to our acceptance of the State's secular purpose in displaying the Commandments. But even if the evidence of the efforts in 1993 were disregarded, it would not diminish the explanatory power of the location where the monument was placed in 1961 and has since resided.

V

History matters here. For forty-two years, the monument has stood in Austin without the filing of any legal complaint. This quiescence is remarkable for Travis County, the seat of state government and the home of the University of Texas, whose campus is a stone's throw away from the Capitol grounds. This Court is well aware that Travis County is not lacking in persons willing and able to seek judicial relief from perceived interferences with constitutional rights.[21] Had this monument been recently installed, the inference of religious purpose would have been stronger. That it has been in place for so long adds force to the contention that the legislature had a secular purpose. As Judge Becker observed:

> The reasonable observer would perceive an historic plaque as less of an endorsement of religion than a more recent religious display *not* because the Ten Commandments have lost their religious significance, but because the maintenance of this plaque sends a much different message about the religious views of the County. . . . The reasonable observer, knowing the age of the . . . plaque, would regard the decision to leave it in place as motivated, in significant part, by the desire to preserve a longstanding plaque.[22]

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[21] *See e.g. O'Hair v. Murray,* 588 F.2d 1144 (5th Cir.1979) (addressing a constitutional challenge to the motto "In God We Trust"); *Murray v. City of Austin, Texas,* 947 F.2d 147 (5th. Cir.1991) (examining a claim that the inclusion of a Christian cross in the insignia of the City of Austin violated the Establishment and Free Exercise Clauses).

[22] *Freethought Soc. of Greater Philadelphia v. Chester County,* 334 F.3d 247, 265 (3rd Cir.2003).

In sum, we are persuaded that Texas does not violate the First Amendment by retaining a forty-two-year-old display of the decalogue. The Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court Building and the Capitol Building housing the legislative and executive branches of government. We are not persuaded that a reasonable viewer touring the Capitol and its grounds, informed of its history and its placement, would conclude that the State is endorsing the religious rather than the secular message of the decalogue.

To say this is not to diminish the reality that it is a sacred text to many, for it is also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people. The power of that counsel is evidenced by its expression in the civil and criminal laws of the free world. No judicial decree can erase that history and its continuing influence on our laws – there is no escape from its secular and religious character. There is no constitutional right to be free of government endorsement of its own laws. Certainly, we disserve no constitutional principle by concluding that a State's display of the decalogue in a manner that honors its secular strength is not inevitably an impermissible endorsement of its religious message in the eyes of our reasonable observer. To say otherwise retreats from the objective test of an informed person to the heckler's veto of the unreasonable or ill-informed – replacing the sense of proportion and fit with uncompromising rigidity at a costly price to the values of the First Amendment. A display of Moses with the Ten Commandments such as the one located in the United States Supreme Court building makes a plain statement about the

decalogue's divine origin. Yet in context even that message does not drown its secular message. So it is here.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-51184

THOMAS VAN ORDEN

Plaintiff-Appellant

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board; DAVID DEWHURST, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas; TOM CRADDICK, in his official capacity as Co-Vice Chairman, State Preservation Board and Speaker of the House of Representatives of Texas; CHRIS HARRIS, in his official capacity as Member of the State Preservation Board; PEGGY HAMRICK, in her official capacity as member of the State Preservation Board; JOCELYN LEVI STRAUS, in her official capacity as member of the Texas Preservation Board; CHARLYNN DOERING, in her official capacity as Interim Executive Director, State Preservation Board

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Filed Jan. 5, 2004)

(Opinion 11/12/03 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, STEWART, and PRADO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

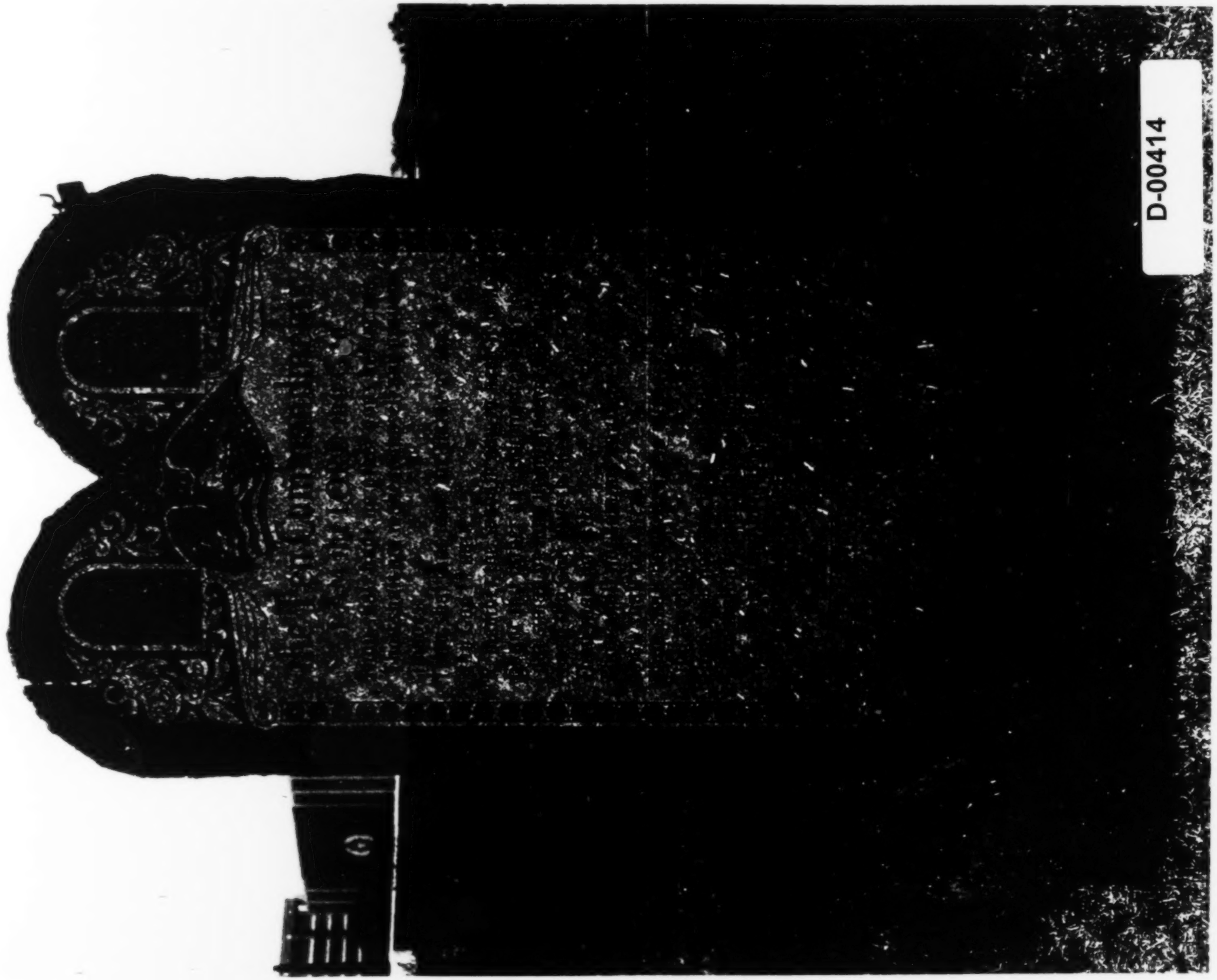
ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

REHG-6a

APPENDIX C

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APPENDIX D

2002 U.S. DIST. LEXIS 26709

THOMAS VAN ORDEN, Plaintiff, v. RICK PERRY, et al., Defendants.

NO. A-01-CA-833-H

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

October 2, 2002, Decided
October 2, 2002, Filed

COUNSEL: THOMAS VAN ORDEN, plaintiff, Pro se, Austin, TX.

For RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, BILL RATLIFF, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas, JAMES E. "PETE" LANEY, in his official capacity as Co-Vice Chairman, State Preservation Board and speaker of the House of Representatives of Texas, DAVID CAIN, in his official capacity as Member of the State Preservation Board. TONY GOOLSBY, in his official capacity as Member of the State Preservation Board, JOCELYN LEVI STRAUS, in her official capacity as Member of the Texas Preservation Board, RICK CRAWFORD, in his official capacity as Executive Director, State Preservation Board, defendants: Michael Winget-Hernandez, Office of the Attorney General, Austin, TX.

For LIBERTY COUNSEL, amicus: Mathew D. Staver, Longwood, FL.

For LIBERTY COUNSEL, amicus: Kathleen A. Cassidy Goodman, Law Office of Kathleen Cassidy Goodman, San Antonio, TX.

JUDGES: HARRY LEE HUDSPETH, SENIOR UNITED STATES DISTRICT JUDGE.

OPINION BY: HARRY LEE HUDSPETH

OPINION:

MEMORANDUM OPINION AND ORDER

"Ship me somewhere east of Suez, where the best is like the worst. Where there ain't no Ten Commandments, an' a man can raise a thirst."

Mandalay by Rudyard Kipling

This is a civil action for injunctive and declaratory relief under 42 U.S.C. § 1983. Plaintiff Thomas Van Orden is a law school graduate and was at one time a licensed lawyer. His law license is presently inactive. The Defendants are Rick Crawford, who is the Executive Director of the State Preservation Board, and the six members of that Board. This Board is responsible for the maintenance and upkeep of the Texas State Capitol and its grounds. In his complaint the Plaintiff alleges that the Defendants are permitting to be displayed on the grounds of the State Capitol a granite monument on which is engraved a version of the Ten Commandments. The Plaintiff contends that this display on state property violates the *Establishment Clause of the First Amendment*[1] made applicable to

[1] "Congress shall make no law respecting an establishment of religion. . . ."

the states by the *Fourteenth Amendment*. The Plaintiff requests[2] that this Court enter a declaratory judgment to that effect and also issue a mandatory injunction requiring the removal of the Ten Commandments monument from display on the grounds of the Capitol.

The history of the Ten Commandments monument that stands on the Capitol grounds is not in dispute among the parties and may be quickly summarized.

In the 1950s and early 1960s, the Fraternal Order of Eagles, a national social, civic, and patriotic organization, launched a project of donating granite monuments similar to the one in issue here to states, counties, and cities all over the United States. Many of these monuments were accepted by those governmental entities, and were erected on the grounds of state capitols, county courthouses, municipal buildings, and public parks throughout the United States. The particular Ten Commandments monument of which the Plaintiff complains in this case was offered to the State of Texas by the Fraternal Order of Eagles in 1961. The Texas Legislature accepted the donation of the monument, and it was installed very near its present location northwest of the rotunda of the State Capitol Building. The specific location was recommended by the Building Engineering and Management Division of the State Board of Control (Exhibit 2).[3] The physical labor and cost of installation were borne by the Fraternal Order

[2] Ironically, the Plaintiff "prayed" for this relief. (Second Amended Complaint, page 6).

[3] Prior to the creation of the State Preservation Board, the State Board of Control was the organization responsible for the maintenance and upkeep of the State Capitol grounds.

of Eagles. The monument remained in place until June, 1990, at which time it had to be removed and stored to permit the excavation necessary to construct the Capitol extension. It was reinstalled in its previous location on March 26, 1993. For reasons that are not clear from the record, however, upon reinstallation the monument was turned around to face roughly southwest. The Ten Commandments monument is one of seventeen monuments and memorials which stand on the grounds of the State Capitol and for the maintenance of which the State Preservation board is responsible.[4] Six monuments other than the Ten Commandments monument are also located in the northwest quadrant of the State Capitol grounds.[5]

The physical appearance of the Ten Commandments monument is illustrated by the photograph admitted in evidence as Exhibit 21. It is a granite monolith, more than six feet high and more than three feet wide. One side of the monument contains no engraving and is smooth. Engraved on the other side is a version of the Ten Commandments without any "chapter and verse" citation to the Old Testament and with no identification of the specific English translation of the Old Testament from which the wording is taken. On the upper part of the monument, above the wording of the Ten Commandments, appear some words in the Hebrew language, an American

[4] Like the Ten Commandments, most of the other monuments were gifts from private organizations.

[5] The other six monuments are a tribute to Texas children, a tribute to the Texas pioneer woman, a replica of the Statue of Liberty, a memorial to the veterans of Pearl Harbor, a memorial to the Korean War veterans, and a memorial to the soldiers of World War I.

flag, an eagle, and a human eye inside a pyramid, similar to the picture on the back of the One Dollar Federal Reserve Note. On the lower part of the monument are found two stars of David and the superimposed Greek letters Chi and Rho, a symbol used in the first century Christian Church to represent Jesus Christ. Finally, on a carving representing a scroll, the following words are engraved: "Presented to the People and Youth of Texas by the Fraternal Order of Eagles of Texas 1961".

A threshold question in this case, as in every case of this type, is the standing of the Plaintiff to bring the suit. *Article III, Section 2 of the Constitution* limits the judicial power of the United States to actual cases and controversies. No authority is given to decide hypothetical cases or to issue advisory opinions. Plaintiff Van Orden must first show, therefore, that he personally has standing to challenge the display of the Ten Commandments monument on the grounds of the State Capitol. In constitutional terms, this means that he must demonstrate that he personally has suffered some actual or threatened injury as a proximate result of the Defendants' conduct and that such injury is likely to be redressed by a favorable decision. ***Valley Forge Christian College v. Americans for Separation of Church and State, Inc.***, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982); ***Murray v. City of Austin, Texas***, 947 F.2d 147, 151 (5th Cir. 1991). In an effort to establish standing in the instant case, Plaintiff Van Orden testified that since 1995 he has made frequent use of the Texas State Law Library located in the State Supreme Court Building just northwest of the Capitol. For the past two years in particular, the frequency of those library visits has averaged twice a week. These visits bring the Plaintiff into frequent, and according to him

unwelcome, contact with the Ten Commandments monument. The Plaintiff reports that as he enters the Supreme Court Building from the east, the Ten Commandments monument is viewable to his left. He also crosses with some frequency from the Supreme Court Building to the Capitol Building itself, which forces him to pass the Ten Commandments monument both going and coming. The Plaintiff testified that these contacts are offensive to him, in that he is not religious; he does not acknowledge the existence of any god, and he specifically does not adhere to either the Christian faith or the Jewish faith. In the Plaintiff's eyes, the existence of the Ten Commandments monument on the grounds of the State Capitol symbolizes a state policy to favor the Jewish and Christian religions over other religions and over non-believers, which "policy" the Plaintiff finds to be personally offensive and also contends is prohibited by the *Establishment Clause*. In light of the very liberal interpretation which the courts have given to the concept of standing in *Establishment Clause* cases, the Court finds that Plaintiff Van Orden has succeeded in crossing the threshold and demonstrating his standing to bring this suit. **See, e.g., *Murray v. City of Austin, Texas, supra*** at 151-52.

One remarkable aspect of the Plaintiff's testimony was his admission that he had been aware of, and offended by, the Ten Commandments monument since approximately 1995. Nevertheless, he waited until December, 2001 to file this suit. If the Plaintiff has the right to request removal of the monument on *Establishment Clause* grounds, he certainly slept on that right for a long time. Because the relief he seeks is equitable in nature, it is necessary to consider the doctrine of laches. The Courts today generally define laches as an inexcusable delay that

results in prejudice to the defendant. ***Conan Properties, Inc. v. Conans Pizza, Inc.***, 752 F.2d 145, 153 (5th cir. 1985). The doctrine of laches has three elements: (1) that the plaintiff delayed in asserting his right; (2) that his delay was inexcusable; and (3) that undue prejudice resulted from the delay. ***Elvis Presley Enterprises, Inc. v. Capece***, 141 F.3d 188, 205 (5th Cir. 1998). Even constitutional claims may sometimes be barred by laches. ***Soules v. Kauaians for Nukolii Campaign Committee***, 849 F 2d 1176, 1182 (9th Cir. 1988); ***Gay Men's Health Crisis v. Sullivan***, 733 F. Supp. 619, 631 (S.D N.Y. 1989). In the instant case, assuming for the sake of argument that the Plaintiff waited an unreasonable length of time to bring his suit, and that his delay was inexcusable, it does not appear that the Defendants were prejudiced by that delay. The monument itself did not change during that six and one-half year period; it stands today as it did in 1995. Furthermore, there is no indication that any evidence was available in 1995 that became unavailable by 2001. **See *Costello v. United States***, 365 U.S. 265, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961). The Court finds that the Plaintiff's cause of action is not barred by the doctrine of laches.

Having concluded that the Plaintiff has standing to bring this suit, and that it is not barred by laches, we turn to the merits of the case and ask the central question: Does the continued display of the FOE-donated Ten Commandments monument on the grounds of the State Capitol contravene the *Establishment Clause of the First Amendment*? In attempting to answer that question, we do not write on a clean slate (or a smooth tablet). Over the past thirty years, several courts have been presented with the same question concerning the same monument

donated by the Fraternal Order of Eagles. The decisions, however, are not in harmony. Displaying the monument on government property has been approved in the Tenth Circuit, ***Anderson v. Salt Lake City Corporation***, 475 F.2d 29 (10th Cir. 1973), and disallowed in the Seventh Circuit. ***Books v. City of Elkhart, Indiana***, 235 F.3d 292 (7th Cir. 2000), **cert. denied** 532 U.S. 1058, 121 S. Ct. 2209, 149 L. Ed. 2d 1036 (2001). The Fifth Circuit has not ruled on the issue, and the Supreme Court, to the chagrin of some of its members, has assiduously avoided it. *City of Elkhart, Indiana v. Books*, 532 U.S. 1058, 121 S. Ct. 2209, 149 L. Ed. 2d 1036 (2001) (Rehnquist, C.J., Scalia, J., and Thomas, J., dissenting from denial of certiorari). The answer must be sought from other Supreme Court opinions interpreting the *Establishment Clause*.

A popular professor of Constitutional Law, Dr. Caleb Perry Patterson, once proposed the following interpretation of the *Commerce Clause*. "The state can tax interstate commerce, but not too much!" Interpretations of the *Establishment Clause* seem to occupy the same twilight zone of imprecision. The Supreme Court itself has recognized that the line which separates church and state is a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship". ***Lemon v. Kurtzman***, 403 U.S. 602, 615, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). Indeed, the blurred and indistinct nature of this line of separation has resulted in some vividly contrasting decisions over the years. For example, the Court has held that allowing the display of a nativity scene on the staircase of a county courthouse at Christmas time runs afoul of the *Establishment Clause*, ***County of Allegheny v. ACLU, Greater Pittsburg Chapter***, 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989), but that

using state funds to pay the wages of a Presbyterian minister to server as a chaplain to the state legislature and to open each session with a prayer does not contravene the *Establishment Clause*. ***Marsh v. Chambers***, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983).

In ***Lemon v. Kurtzman, supra***, the Supreme Court announced a three-prong test to be applied when a claim was made that a state action violated the *Establishment Clause*. In the thirty years since **Lemon** was decided, several individual members of the Court have criticized the **Lemon** test, and the entire Court has simply ignored it on some occasions. **See *Lynch v. Donnelly***, 465 U.S. 668, 679, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984). Nevertheless, it remains the starting point in analyzing *Establishment Clause* controversies. In order to pass muster under the **Lemon** test, a state statute, policy, or action (1) must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not lead to excessive government entanglement with religion. ***Lemon v. Kurtzman, supra*** at 612-13. In the instant case, the parties agree that the third prong of the **Lemon** test, "entanglement" is not in issue. It is only necessary, therefore, to focus on the first and second prongs of the **Lemon** test.

The first question is whether the State of Texas had a secular purpose in accepting the Ten Commandments monument and in permitting and continuing to permit its display. Case law does not require that a state's purpose be "exclusively secular". ***Lynch v. Donnelly, supra*** at 681 n. 6.; ***Wallace v. Jaffree***, 472 U.S. 38, 56, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985). It is only required that the secular purpose be bona fide, legitimate, and not a mere sham.

Lynch v. Donnelly, supra at 681, ***American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board***, 243 F.3d 289, 308 (6th Cir. 2001); ***American Jewish Congress v. City of Chicago***, 827 F.2d 120, 126-27 (7th Cir. 1987); ***Anderson v. Salt Lake City Corporation, supra*** at 34. In the instant case, the best evidence of the State's purpose is found in Senate Concurrent Resolution Number Sixteen, the legislative act which permitted the Fraternal Order of Eagles to place the Ten Commandments monument on the Capitol grounds. The resolution was adopted by the Texas Senate on February 14, 1961, by the Texas House on February 22, 1961, and was signed by the governor on March 10, 1961. The pertinent language of the resolution is "that the Fraternal Order of the [sic] Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation and be granted permission to have this granite monolith placed on the grounds of the State Capitol of Texas" (Exhibit 1). In one of the "whereas" clauses, the resolution also notes that the purpose of the Eagles organization in donating the monument was "to promote youth morality and to help stop the alarming increase in delinquency" (Exhibit 1). The State's purpose as revealed by the language of the concurrent resolution was a legitimate secular purpose, to wit: to recognize and commend a private organization for its efforts to reduce juvenile delinquency. The Plaintiff has produced no convincing evidence that the stated purposes was a sham. The Court finds that a bona fide and valid secular purpose has been shown.

The Defendants have invited the Court to find yet another legitimate secular purpose in the State's decision

to accept and display the monument. They argue that the Ten Commandments, as an ancient legal code encompassing secular as well as religious precepts, is part of the foundation of modern secular law in Texas and elsewhere. The Court agrees that this would have been a legitimate secular purpose. However, there is no evidence that the Legislature, the State Preservation Board, or any other department or responsible official of the State of Texas has ever advanced such a purpose. In fact, the only evidence the Defendants can offer in support of this alleged purpose is the May 15, 1961 memorandum from the Building Engineering and Management Division recommending a location for the monument between the Capitol rotunda and the Supreme Court Building (Exhibit 2). Having found no reference to the influence of the Ten Commandments on secular law in the proceedings of the Texas Legislature, or of the State Preservation Board, or of any other agency of the State of Texas, the Court must find that the evidence fails to support the existence of such a purpose on the part of the State of Texas.

Since **Lemon v. Kurtzman** was decided more than thirty years ago, the second prong of the **Lemon** test has undergone some refinements. Whereas **Lemon** asks the question whether a practice has the principal or primary effect of advancing or inhibiting religion, 403 U.S. at 612-13, more recent Supreme Court decisions speak in terms of whether a challenged governmental practice has the purpose or effect of "endorsing" religion. ***County of Allegheny v. ACLU, Greater Pittsburg Chapter, supra*** **at 593. See also** ***Capitol Square Review and Advisory Board v. Pinette***, 515 U.S. 753, 764, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995); ***Murray v. City of Austin, Texas, supra*** at 156. It is clear that the endorsement test cannot

be applied in a vacuum. Instead, the Court must attempt to view each situation from the standpoint of a reasonable observer, mindful of the history, purpose and context of the intersection between state and religion which is under examination. ***Murray v. City of Austin, Texas, supra*** at 156.

The history and purpose of the Ten Commandments monument has already been discussed. Senate Concurrent Resolution Number Sixteen (Exhibit 1), which formally accepted the Ten Commandments monument from the Fraternal Order of Eagles, makes no reference to religion. Neither the Senate journal nor the House journal contains any record of discussion or debate about the monument or the reasons for its acceptance by the Legislature on behalf of the State of Texas (Exhibit 1). When the monument was actually installed on the Capitol grounds, Senator Bruce Reagan and Representative Will Smith presided over the formal dedication. There is no record of participation by any other person in the dedication ceremonies. Specifically, there is no record of participation in the ceremony by any Christian clergyman or Jewish rabbi. **Compare *Books v. City of Elhart, Indiana, supra*** at 303.

Also relevant to a discussion of the history of the monument is the fact that in 1986, twenty-five years after the erection of the monument, the United States Secretary of the Interior designated the Texas State Capitol and its grounds as a National Historic Landmark (Exhibit 3). This designation served to place the Capitol and its grounds in the National Register of Historic Places, and brought it within the provisions of the *National Historic Preservation Act of 1966* (Exhibit 3). This designation lends support to the Defendants' contention that the State Capitol and its grounds are the functional equivalent of a

museum (Transcript pp. 57-58). **See *Lynch v. Donnelly, supra*** at 677-78.

Neither the location nor the physical characteristics of the Ten Commandments monument would lead a reasonable observer to conclude that the State is seeking to advance, endorse or promote religion by permitting its display. Unlike many of the sixteen other monuments with which it shares the Capitol grounds, the Ten Commandments monument does not bear the state seal of Texas, or even the Lone Star which is symbolic of the State. The only explanation of its presence is the proclamation that it was presented to the State by a private civic and service organization in 1961. The precise location of the monument is also significant. The Capitol building faces south, and the south entrance is considered the main entrance. The great majority of visitors to the State Capitol and its grounds approach from the south or the east. The Ten Commandments monument is located in the northwest quadrant of the Capitol grounds, well off the usual beaten path for tourists. Indeed, but for the publicity generated by the present litigation, most visitors to the State Capitol and most residents of the State of Texas would have been unaware of the existence of the Ten Commandments monument. It is safe bet that over the years many of those who were aware of the monument were, like the Plaintiff himself, lawyers in transit between the Supreme Court Building and the Capitol rotunda. Whatever the reason, it is noteworthy that the monument was in place for more than forty years before any individual or organization complained about it. The Plaintiff admits that he personally observed the monument for more than six years before he protested its presence by filing this suit. These facts significantly undermine the Plaintiff's contention that the

very existence of the monument sends "a clear message that, politically, there are ins and outs in Texas based on personal religious beliefs" (Plaintiff's trial brief page 5). Viewed in the proper context, and in light of its history, this passive monument cannot be said to advance, endorse, or promote religion to a degree that would require the drastic remedy of ordering the Defendants to remove it from the Capitol grounds. "The wholesome neutrality guaranteed by the Establishment and *Free Exercise Clauses* does not dictate obliteration of all our religious traditions." ***Anderson v. Salt Lake City Corporation, supra*** at 34.

It is therefore ORDERED that the Plaintiff's request for injunctive and declaratory relief in the above-styled and numbered cause be, and it is hereby, DENIED.

It is further ORDERED that judgment be, and it is hereby, ENTERED in favor of the Defendant, and that the Plaintiff take nothing by his suit.

SIGNED AND ENTERED this 2nd day of October, 2002.

HARRY LEE HUDSPETH

SENIOR UNITED STATES DISTRICT JUDGE

JUDGMENT

In accordance with the Memorandum Opinion and Order this day entered in the above-styled and numbered cause,

It is ORDERED, ADJUDGED and DECREED that judgment be, and it is hereby, ENTERED for the Defendants, and that the Plaintiff take nothing by his suit.

SIGNED AND ENTERED this 2nd day of October, 2002.

HARRY LEE HUDSPETH

SENIOR UNITED STATES DISTRICT JUDGE